

Repco (M) Sdn Bhd v Tan Toh Fatt & Ors

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HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO S2-22-367
OF 2001

ASMABI MOHAMAD JC

18 JANUARY 2012

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Contract — Breach — Breach of confidentiality — Whether information sought to be protected confidential in nature — Whether communicated in circumstances importing an obligation of confidence — Whether information used in unauthorised way — Whether information used to plaintiff's detriment — Whether information proven to be trade secret

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Contract — Restraint in trade — Whether clause restricting defendants joining another company with similar trade tantamount to restraint in trade — Whether void pursuant to s 29 of the Contracts Act 1950

E

Tort — Conspiracy — Proof of — Allegation of conspiracy to defraud — Burden of proof — Whether allegation supported by full particulars

The plaintiff was a company dealing with the distribution and sale of automotive spare parts for after sale market. The plaintiff commenced the action against all the defendants for alleged breach of confidentiality, breach of good faith and fidelity, conspiracy to injure, false allegations, unlawful interference, 'poaching' of employees, 'poaching' of suppliers for product lines and economic sabotage. The first to the seventh defendants were all former employees of the plaintiff. The eighth and ninth defendants were incorporated on 5 May 1994 and 8 November 1995 respectively. The defendants however pleaded that the plaintiff's claim did not disclose a cause of action in law.

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Held, dismissing the plaintiff's claim with costs:

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- (1) In order to establish the defendants' liability for breach of confidentiality, it must be proved that the information sought to be protected was confidential in nature; that it had been communicated in circumstances importing an obligation of confidence; and that the information was used in an unauthorised way and to the plaintiff's detriment. Based on the evidence, the plaintiff had failed to meet the requirements (see paras 33 & 35).
- (2) It was evident that the list of the customers in the automotive spare parts industry was freely available in the market. Further, the first, second,

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- A third and fourth defendants were senior employees of the plaintiff with extensive experience in the automotive industry. In view of their length of experience in the industry the defendants would have undoubtedly acquired the information and knowledge about the customers through their years of dealings with the customers as part and parcel of their scope of duties in the plaintiff. So long as the defendant did not obtain the information and or acquired the knowledge surreptitiously it could not be said that it constituted a trade secret. Knowledge on the part of the defendants of the information did not constitute trade secrets which are considered proprietary rights which warranted protection by this court.
- B In the circumstances, the plaintiff had failed to prove their pleaded case of breach of confidentiality or trade secret against the defendants. The plaintiff's entire case was founded on speculations and conjunctures (see paras 35(a), (b) & 36).
- C
- D (3) The plaintiff also could not contend that the first to the seventh defendants were not entitled to join another company and compete with the plaintiff as the evidence had shown that it was not part of the term of their employment that they could not compete with the plaintiff if they had decided to resign and or retire from the plaintiff. In any event, any clause which restricts the defendants from joining another company with similar trade tantamount to restraint of trade and is void pursuant to s 29 of the Contracts Act 1950 (see para 35(k)).
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- F (4) PW2 and PW3, the plaintiff's witness and representatives of NGK, testified that NGK Spark Plug Malaysia ('NGK') had the prerogative to appoint whichever company it had faith in to market its products. PW2 had also confirmed that the plaintiff was never appointed as the exclusive distributor of NGK. Hence, the plaintiff's assertions of breach of good faith and fidelity pertaining to NGK Spark Plugs were merely bare allegations unsupported by reliable and credible evidence. The court was therefore satisfied that the plaintiff's claim that the first to seventh defendants had approached and persuaded NGK to cease their business and/or reduce their supply to the plaintiff was without merits and ought to be rejected (see paras 39, 43 & 45).
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- H (5) None of the plaintiff's employees testified that the first to seventh defendants had approached them to coax them to leave the plaintiff and work for the eighth defendant. The plaintiff also could not provide the statistics to show the number of its employees who had left the plaintiff to join the eighth defendant or identify who were the plaintiff's employees who were currently working for the eighth defendant. Thus the plaintiff's allegation of 'poaching' of its employees by the defendants was merely bare assertion unsupported by evidence either testimonial and or documentaries. The plaintiff also had not adduced credible evidence to demonstrate that the defendants had caused the plaintiff's other suppliers
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to terminate the plaintiff's distributorship rights and grant the eighth defendant those rights (see paras 46, 52–54).

- (6) Further, the plaintiff's own witness testified that it was common knowledge that the plaintiff was diverting its business and focusing on the gaming industry and that it was in the news. The fact was further supported by the Annual Reports of Repco Holding Bhd, a parent company of the plaintiff, which disclosed that the plaintiff was moving from its automotive parts business to gaming and timber industry (see para 57).
- (7) Based on the evidence adduced in the instant case, the plaintiff had failed miserably to meet with the standard of proof to establish any allegation of conspiracy to defraud beyond reasonable doubt. It is settled law that the assertion of conspiracy requires the strictest pleading and must be supported by full particulars. However, the plaintiff had failed to properly plead the particulars to support its case of conspiracy to injure. Further, the plaintiff did not prove that there were overt acts on the part of the first and second defendants which had resulted in the loss suffered by the plaintiff, an essential ingredient in the tort of conspiracy (see paras 63–65).
- (8) The plaintiff's allegation that the first defendant had purposely paid commission upon sales and not upon collection with the aim to injure the plaintiff and in preparation of the first defendant's resignation was not proved by way of documentary evidence. The plaintiff merely produced records for the commission paid to support its contention of payment of commission upon sales and not upon collection (see paras 72–73).
- (9) On the totality of evidence both testimonial and documentary the court was satisfied that the plaintiff had failed to discharge the onus placed on it by the law to prove its case against all the defendants on the balance of probabilities and/or beyond reasonable doubt whichever was applicable to the plaintiff's pleaded case (see para 79).

[Bahasa Malaysia summary]

Plaintif merupakan syarikat yang berurusan dengan pengedaran dan penjualan alat ganti automatik selepas jualan pasaran. Plaintif memulakan tindakan terhadap kesemua defendan bagi dakwaan kemungkiran kerahsiaan, kemungkiran kejujuran dan kesetiaan, konspirasi untuk menjejaskan, dakwaan palsu, campur tangan secara tidak sah, 'poaching' pekerja, 'poaching' pembekal bagi produk dan sabotaj ekonomi. Defendan-defendan pertama hingga ketujuh adalah kesemuanya adalah bekas pekerja plaintif. Defendan-defendan kelapan dan kesembilan masing-masing ditubuhkan pada 5 Mei 1994 dan 8 November 1995. Defendan-defendan walau bagaimanapun

- A memplidkan bahawa tuntutan plaintif tidak mendedahkan kausa tindakan dari segi undang-undang.

Diputuskan, menolak tuntutan plaintif dengan kos:

- B (1) Untuk membuktikan liabiliti defendan-defendan bagi kemungkiran kerahsiaan, ia mesti dibuktikan bahawa maklumat yang hendak dilindungi adalah bersifat sulit; bahawa ia telah dikomunikasi dalam keadaan yang mewujudkan tanggungjawab kerahsiaan; dan bahawa maklumat tersebut digunakan dalam cara yang tidak dibenarkan dan memudaratkan kepada plaintif. Berdasarkan kepada keterangan, plaintif
- C gagal membuktikan keperluan-keperluan tersebut (lihat perenggan 33 & 35).
- D (2) Adalah jelas bahawa senarai pelanggan di dalam industri alat ganti automatif boleh didapati secara mudah dalam pasaran. Selanjutnya, defendan-defendan pertama, kedua, ketiga dan keempat adalah pekerja kanan plaintif yang berpengalaman dalam industri automatif. Berikutan jangka masa lama pengalaman mereka di dalam industri tersebut defendan-defendan adalah tanpa diragui telah memperoleh maklumat dan pengetahuan mengenai pelanggan-pelanggan tersebut melalui pengalaman mereka berurusan dengan pelanggan-pelanggan tersebut sebagai sebahagian skop tanggungjawab mereka dengan plaintif. Asalkan defendan-defendan tidak memperoleh maklumat dan mendapat pengetahuan tersebut secara curi-curi ia tidak boleh dikatakan membentuk rahsia perniagaan. Pengetahuan mengenai maklumat
- E tersebut oleh pihak defendan-defendan tidak membentuk rahsia perniagaan yang dikatakan hak milik yang mewajarkan perlindungan oleh mahkamah ini. Dalam keadaan tersebut, plaintif gagal membuktikan kes mereka yang diplid bagi kemungkiran kerahsiaan atau rahsia perniagaan terhadap defendan-defendan. Keseluruhan kes plaintif
- F adalah berdasarkan kepada spekulasi dan konjunktur (lihat perenggan 35(a), (b) & 36).
- G (3) Plaintif juga tidak boleh menyatakan bahawa defendan-defendan pertama hingga ketujuh tidak berhak bekerja dengan syarikat lain dan bersaing dengan plaintif kerana keterangan menunjukkan bahawa ia bukan sebahagian daripada terma pekerjaan mereka bahawa mereka tidak boleh bersaing dengan plaintif jika mereka memutuskan untuk meletak jawatan atau bersara daripada plaintif. Walau bagaimanapun, apa-apa klausa yang menghalang defendan-defendan daripada menyertai syarikat lain dengan perniagaan yang serupa menjurus kepada penyekatan perniagaan dan adalah batal berikutan s 29 Akta Kontrak 1950 (lihat perenggan 35(k)).
- H
- I (4) PW2 dan PW3, saksi plaintif dan wakil NGK, memberikan keterangan bahawa NGK Spark Plug Malaysia (NGK) mempunyai prerogatif untuk

- melantik mana-mana syarikat yang ia mempunyai kepercayaan untuk memasarkan produknya. PW2 juga mengesahkan bahawa plaintif tidak pernah dilantik sebagai pengedar eksklusif NGK. Oleh demikian hujahan kemungkiran kejujuran dan kesetiaan oleh plaintif berkaitan dengan NGK Spark Plugs adalah dakwaan kosong semata-mata yang tidak disokong oleh keterangan yang boleh disandar dan boleh dipercayai. Mahkamah oleh itu berpuas hati bahawa tuntutan plaintif bahawa defendan-defendan pertama hingga ketujuh telah menemui dan memujuk NGK untuk memberhentikan perniagaan dan/atau mengurangkan bekalan mereka kepada plaintif adalah tanpa merit dan wajar ditolak (lihat perenggan 39, 43 & 45). A B C
- (5) Tidak ada seorang pun pekerja plaintif yang memberi keterangan bahawa defendan-defendan pertama hingga ketujuh telah menemui mereka untuk memujuk mereka meninggalkan plaintif dan bekerja untuk defendan kelapan. Plaintif juga tidak boleh memberikan statistik untuk menunjukkan jumlah pekerja-pekerjanya yang telah meninggalkan plaintif untuk bekerja dengan defendan kelapan atau mengenal pasti siapakah pekerja-pekerja plaintif yang kini bekerja dengan defendan kelapan. Oleh itu, dakwaan plaintif tentang 'poaching' pekerja-pekerjanya oleh defendan-defendan adalah dakwaan kosong semata-mata yang tidak disokong oleh keterangan sama ada secara testimoni atau dokumentar. Plaintif juga tidak mengemukakan keterangan yang boleh dipercayai untuk menunjukkan bahawa defendan-defendan telah menyebabkan lain-lain pembekal plaintif untuk menamatkan hak pengedaran plaintif dan memberikan defendan kelapan hak tersebut (lihat perenggan 46, 52–54). D E F
- (6) Selanjutnya, saksi plaintif sendiri memberikan keterangan bahawa adalah pengetahuan umum bahawa plaintif sedang mengalih perniagaannya dan memfokus kepada industri perjudian dan bahawa ia telah keluar dalam berita. Fakta tersebut disokong selanjutnya oleh Laporan Tahunan Repco Holding Bhd, syarikat induk plaintif, yang mendedahkan bahawa plaintif sedang beralih daripada perniagaan alat-alat automotif kepada industri perjudian dan pembalakan (lihat perenggan 57). G H
- (7) Berdasarkan kepada keterangan yang dikemukakan di dalam kes ini, plaintif telah gagal sama sekali untuk mencapai standard pembuktian untuk membuktikan apa-apa dakwaan konspirasi untuk memfraud melampaui keraguan munasabah. Ia juga adalah undang-undang yang matan bahawa dakwaan konspirasi memerlukan pliding secara ketat dan mesti disokong oleh butir yang penuh. Walau bagaimanapun, plaintif tidak membuktikan bahawa terdapat tindakan terang-terangan pada I

- A pihak defendan-defendan pertama dan kedua yang telah menyebabkan kerugian yang dialami oleh plaintif, salah satu elemen penting dalam tort konspirasi (lihat perenggan 63–65).
- B (8) Dakwaan plaintif bahawa defendan pertama telah secara sengaja membayar komisyen selepas jualan dan bukan selepas pengutipan dengan tujuan untuk menjejaskan plaintif dan dalam penyediaan peletakan jawatan defendan pertama tidak dibuktikan melalui keterangan dokumentar. Plaintif semata-mata mengemukakan rekod-rekod untuk komisyen yang dibayar untuk menyokong dakwaan pembayaran komisyen selepas jualan dan bukan selepas pengutipan (lihat perenggan 72–73).
- C (9) Atas keseluruhan keterangan testimoni dan dokumentar, mahkamah berpuashati bahawa plaintif telah gagal melepaskan beban yang diletakkan di atasnya di sisi undang-undang untuk membuktikan kesnya terhadap kesemua defendan atas imbalan kebarangkalian dan/atau melampaui keraguan munasabah yang terpakai kepada kes plaintif yang dipidkan (lihat perenggan 79).]
- D

Cases referred to

- E *Chong Song @ Chong Sum & Anor v Uma Devi a/p V Kandiah* [2011] 2 MLJ 585, CA (refd)
Chu Choon Moi v Ngan Siew Tin [1986] 1 MLJ 34; [1985] 1 LNS 134, SC (refd)
Coco v AN Clark (Engineers) Ltd (No 2) [1969] RPC 41, Ch D (refd)
- F *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328; [1995] 1 LNS 80, HC (refd)
Industrial Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332; [2001] 8 CLJ 262, HC (refd)
Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (refd)
- G *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124; [1986] CLJ (Rep) 185; [1986] 2 CLJ 285, SC (refd)
Marrinan v Vibart [1962] 1 All ER 869, QBD (refd)
- H *Mediv AC International Management Pte Ltd v John Walter Moore* [1988] 1 MLJ 5 (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Narayanan v Official Assignee, Rangoon AIR 1941 PC 93, PC (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136; [1980] 1 LNS 55, FC (refd)
- I *Saminathan v Pappa* [1981] 1 MLJ 121; [1980] 1 LNS 174, PC (refd)
Seah Siang Mong v Ong Ban Chai [1998] 1 CLJ Supp 295, HC (refd)
Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor [2006] 6 MLJ 229; [2006] 4 CLJ 50, CA (refd)

- SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd* [2008] 4 MLJ 187; [2008] 4 CLJ 20, CA (refd) **A**
- Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling* [2008] 7 MLJ 903, HC (distsd)
- Teper v R* [1952] AC 480, PC (refd)
- VSL Prestressing Australia Pty Ltd v DJ Mulholland* [1971] 2 MLJ 89 (refd) **B**
- Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297, HC (distsd)
- YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621, CA (refd)
- Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229, FC (refd) **C**

Legislation referred to

Contracts Act 1950 ss 24, 28, 29

Evidence Act 1950 ss 101, 106

Limitation Act 1953 **D**

(Sidek Teoh Wong & Denis) for the plaintiff.

(Shook Lin & Bok) for the first, second, fifth, sixth, seventh, tenth to 13th defendants.

(Edlin Ghazaly & Associates) for the third, fourth, eight and ninth defendants. **E**

Asmabi Mohamad JC:

INTRODUCTION **F**

[1] The plaintiff, Repco (M) Sdn Bhd is a company dealing with the distribution and sale of automotive spare parts for after sale market. The first to the seventh defendants were all former employees of the plaintiff. The first to the fourth defendants were at all material times prior to their departure from the plaintiff, senior employees of the plaintiff. The eighth defendant was incorporated on 5 May 1994. Between April to July 1996 the first to the fourth defendants became the directors of the eighth defendant. The ninth defendant, a wholly owned company by the eighth defendant was incorporated on 8 November 1995. **G**

[2] The plaintiff commenced this action against all the defendants for alleged breach of confidentiality, breach of good faith and fidelity, conspiracy to injure, false allegations, unlawful interference, 'poaching' of employees, 'poaching' of suppliers for product lines and economic sabotage. **I**

[3] After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by all learned counsels for the respective

A parties I find that the plaintiff had failed to prove its claim on the standard required by the law pertaining to each of the plaintiff's pleaded case as stated in its statement of claim ('SOC'). Accordingly I dismissed the plaintiffs' claims against the defendants with costs.

B [4] The plaintiffs being dissatisfied with the said decision appealed to the Court of Appeal against the whole of the said decision.

BACKGROUND FACTS (ESTABLISHED AFTER A FULL TRIAL AND
C ARE NOT IN DISPUTE)

The plaintiffs

D [5] The plaintiff is in the business of distribution and sale of automotive spare parts and has the presence in the automotive spare parts distribution industry for over forty three years.

The defendants

E [6] The first defendant commenced his employment with the plaintiff as a store keeper in July 1975 and over the years he was promoted several times. In or about 1994 the first defendant was appointed as a general sales manager and had held that position until his resignation and or release on 30 May 1995. The first defendant joined the eighth defendant on 1 July 1995. On 3 June 1996 he became a shareholder of the eighth defendant. On or about October 2002 the first defendant sold off all his shareholding in the eighth defendant and resigned from all positions. The first defendant is currently a general manager of a company dealing with automotive parts known as JM Patent (M) Sdn Bhd.
F
G The first defendant is the nephew of the second defendant.

[7] The second defendant (*now deceased*) joined the plaintiff in 1969 and held several posts such as area sales supervisor and branch manager until his appointment as managing director of the plaintiff in 1985. The second defendant held this post until his resignation from the plaintiff on 16 September 1995. The second defendant passed away on 26 May 2009 and had been substituted by the tenth to the 13th defendants who are the executors and administrators of the estate of the second defendant. The second defendant is the uncle of the first defendant.
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I [8] The third defendant commenced his employment with the plaintiff in 1983 as an accountant/ administrator. In 1989 the third defendant was appointed as financial controller/administrator of the plaintiff and held that post until his resignation from the plaintiff on 15 May 1995. The third

defendant joined the eighth defendant on 16 January 1995 and is now the general manager of the eighth defendant. A

[9] The fourth defendant joined the plaintiff in 1972 as a storekeeper. He held the post of a sales representative in 1976 and was promoted to a sales executive in 1984. His last post prior to his resignation from the plaintiff on 5 May 1995 was as a branch manager of sales. B

[10] The fifth defendant is the wife of the first defendant started her employment with the plaintiff in July 1991 as an account supervisor and resigned from the plaintiff on 12 September 1994. The fifth defendant joined the eighth defendant around December 1994 and became its shareholder on 19 May 1997. In October 2002 the fifth defendant had relinquished all her positions in the eighth defendant and sold all shares in the said company. C

[11] The sixth defendant who is the brother of the first defendant started his employment with the plaintiff on 8 April 1985 as a store assistant and was promoted to the post of a sales representative on 1 May 1990 followed by the post of warehouse supervisor in 1994. The sixth defendant resigned from the plaintiff on 1 July 1995. On 10 of July 1995 the sixth defendant became the shareholder of the eighth defendant. The sixth defendant had relinquished all his positions in the eighth defendant and sold all his shareholdings in the eighth defendant around March 2002. D E

[12] The seventh defendant is also the brother of the first defendant commenced his employment with the plaintiff in May 1984 as a store man. He was appointed as a sales representative in January 1990 and in June 1993 he was appointed as a sales executive. On 30 July 1995 the seventh defendant resigned from the plaintiff. He became a shareholder of the eighth defendant on 19 May 1997 and relinquished from all positions and sold of his shareholding in the eighth defendant around October 2002. F G

[13] The eighth defendant was incorporated on 5 May 1994. Between April/July 1996 the first to fourth defendant became its directors. The third defendant is the general manager from January 1995 and was also a company secretary from June 1996. H

[14] The ninth defendant a wholly owned company by the eighth defendant was incorporated on 8 November 1995. I

DOCUMENTS

[15] At the outset of the trial parties have agreed for the following documents to be used:

A	i.	Bundle of Pleadings —	‘A’
	ii.	Agreed Bundle of Documents (Section A) —	‘A1’
	iii.	Non Agreed Bundle (Section B)	‘B1’
B	iv.	Non Agreed Bundle (Section B)	‘B2’
	v.	Non Agreed Bundle (Section B)	‘B3’
	vi.	Non Agreed Bundle (Section B)	‘B4’
	vii.	Non Agreed Bundle (Section B)	‘B5’
	viii.	Non Agreed Bundle (Section C)	‘C1’
C	ix.	Non Agreed Bundle (Section C)	‘C2’
	x.	Non Agreed Bundle (Section C)	‘C3’
	xi.	Non Agreed Bundle (Section C)	‘C4’
	xii.	Non Agreed Bundle (Section C)	‘C5’
	xiii.	Non Agreed Bundle (Section C)	‘C6’
D	xiv.	Plaintiff’s Additional Bundle of Document	‘D’
	xv.	Statement of Agreed Facts	‘D1’
	xvi.	Issues To Be Tried	‘D2’
E	xvii.	Opening Statement of the Plaintiff	‘G’

THE ISSUES RAISED

F [16] The parties raised numerous issues to be tried as stated in document ‘F’. The broad issues are summarised as follows:

- (a) whether at the material times, the first to seventh defendant owed a duty of good faith and fidelity to the plaintiff and whether they had breached their respective duty of good faith and fidelity;
- G** (b) whether there was an express or implied term which continue to bind the first to the seventh defendants even after the first to seventh defendants left and or resigned from the plaintiff and whether the first to the seventh defendants jointly owed a duty not to utilise, disclose and or remove any document and or confidential information and or trade secret to any other person which would prejudice plaintiff;
- H** (c) if the answer to issue (b) above is in the affirmative, whether the express and or implied terms are against public policy and or are restrictions in trade and unenforceable pursuant to s 24 and or s 28 of the Contracts Act 1950;
- I** (d) whether at the material times the first to the seventh defendants are entitled to take and or make copies of the documents and or the confidential information and or the trade secret and or to utilise and or

- disclose and or remove any documents and or confidential information and or trade secret to any other person without the prior permission of the plaintiff; **A**
- (e) whether the first to the seventh defendants had taken and or made copies of the information and or the documents pertaining to: **B**
- (i) list of names, phone numbers and addresses of the suppliers and customers of the plaintiff and the particulars of the relevant contact persons;
- (ii) list of price quotations of various equipment and automotive parts delivered to the customers; **C**
- (iii) list of the cost and sale prices of the plaintiff's equipment and automotive parts;
- (iv) confidential information pertaining to specific request of the plaintiff's customers; **D**
- (v) suppliers' prices, discounts and confidential information;
- (vi) customers' credit worthiness and manner and or mode of payment; and **E**
- (vii) list of the plaintiff's employees.
- (f) whether the first to the seventh defendants prior to their departure and or retirement had jointly and or severally sold the plaintiff's goods below cost and or at cost and or with low profit margin and or sold at a price which was prejudicial to the plaintiff; **F**
- (g) whether the first to the seventh defendants and or any combination of these defendants were involved in the setting up of the eighth defendant and or ninth defendant with the main purpose to compete with the plaintiff; **G**
- (h) whether the first to the seventh defendants were 'poaching' the employees of the plaintiff for these employees to work for the eighth defendant;
- (i) whether the eight and the ninth defendants were utilising the plaintiff's confidential and or trade secrets for the benefit their businesses; **H**
- (j) whether the first to the seventh defendants were 'poaching' the plaintiff's customers and or suppliers and or influencing them to deal with the eighth and the ninth defendants instead of the plaintiff;
- (k) whether the defendants were making false and serious allegations against the plaintiff which are prejudicial to the plaintiff; **I**
- (l) whether the defendants and or a combination of them had conspired to injure the plaintiff;

- A** (m) whether the defendants were jointly and or severally liable to the plaintiff;
and
(n) whether the plaintiffs claim is speculative and barred by the statute of limitation.

B

THE PLAINTIFF'S CLAIM IN A NUTSHELL

C [17] The plaintiff's claim against the defendants can be summarised as follows:

- (a) the plaintiff alleged that defendants were using the plaintiff's confidential information to deal with the plaintiff's customers and induce them to place orders with the eighth defendant instead of dealing with the plaintiff (para 26 of the SOC);
- D** (b) the first to the seventh defendants obtained confidential information and or trade secrets belonging to the plaintiff for the benefit of the eighth defendant (para 27 of the SOC);
- E** (c) all the defendants were using the plaintiff's confidential information to destroy the plaintiff's reputation and business (para 29 of the SOC);
- (d) The first to the seventh defendants had breached their duty of good faith and fidelity owed to the plaintiff (para 30 of the SOC);
- F** (e) all the defendants had conspired with the aim to defraud the plaintiff (para 31 of the SOC);
- (f) all the defendants had approached the employees of the plaintiff and persuaded them to leave the plaintiff to join the eighth defendant and ninth defendants (para 32.3 of the SOC);
- G** (g) all the defendants had persuaded or influenced the customers of the plaintiff to stop their dealings with the plaintiff and to deal with the eighth and ninth defendant (para 32.3 of the SOC);
- (h) the first to the seventh defendants whilst still in the employment of the plaintiff and prior to their resignation or retirement had sold the plaintiff's goods at below cost and or at cost and or with low profit margin with the object to give a good name in preparation to compete with the plaintiff (para 32.6 of the SOC);
- H**
- I** (i) the defendants had made false and serious allegations against the plaintiff that the plaintiff was no longer active in the automotive parts business (para 34 of the SOC) and or had ceased operation of its business; and
- (j) The plaintiff claimed aggravated, exemplary and punitive damages against all the defendants and also for loss of profit (para 38(f) and (8) of the SOC).

THE DEFENDANTS' DEFENCE

A

[18] The defendants pleaded the following:

- (a) the plaintiff's claim did not disclose a cause of action in law;
- (b) the plaintiff had changed its corporate direction and business and such change had resulted in a shift from the plaintiff's original business operation;
- (c) the second defendant had resigned from the plaintiff in September 1995 and had not until his demise in 2009 taken on employment with any company;
- (d) the first to the seventh defendants denied the existence of any terms whether express or implied which relate to the duty of good faith and fidelity for all confidential information as pleaded by the plaintiff. Even if there were such terms, which were denied, they were vague and ambiguous;
- (e) the first to the seventh defendants denied having received any confidential information and or any trade secrets other than what in law is in fact part of the defendants' general skill, knowledge and or experience;
- (f) the plaintiff had failed to provide particulars of the alleged confidential documents and information and or trade secret;
- (g) further the matters which the plaintiff claimed to be confidential information and or trade secret are generally known to public at large and or the industry concern and are not objectively confidential;
- (h) at the material time the plaintiff was not the exclusive agent of any suppliers for the distribution of automotive spare parts and or exclusive supplier for the customer;
- (i) the main supplier of the NGK Spark Plugs was NGK Spark Plugs (M) is responsible in fixing the cost and sale price of these products and had the authority to appoint several dealers in Malaysia including the eighth and the ninth defendants;
- (j) the second defendant was a non executive director of the eighth defendant from 1 July 1996 to 20 September 1997 and was never a director of the ninth defendant;
- (k) the eighth defendant was a manufacturer of exhaust systems, brake lining, plug cables and horns and there are several businesses dealing with similar business; and
- (l) The plaintiff's claim is barred by the Limitation Act 1953.

A THE EVIDENCE

B [19] The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act 1950. Pursuant to s 101 of the Act, the legal burden of establishing the facts pleaded against the defendants is on the plaintiff. At the conclusion of the case this court has a duty to determine whether sufficient evidence had been adduced by the plaintiff to prove its case on the balance of probabilities and or beyond reasonable doubt, depending on what is appropriate and applicable to the plaintiff's pleaded case.

C [20] Pursuant to s 106 of the Evidence Act 1950 the burden to prove any facts which is especially within the knowledge of the plaintiff lies on the plaintiff.

D [21] With this principle in mind I would now evaluate the plaintiff's evidence in order to ascertain if the plaintiff had met with the standard of proof envisaged by the law.

E [22] The plaintiff had called a sum of ten witnesses to prove its case against all the defendants. They were:

- | | | | |
|---|-----|---|--------|
| | 1. | Yeow Ewe Chuan chief executive officer of the plaintiff | (PW1) |
| | 2. | Chai Foo Seng plant manager NGK Spark Plug | (PW2) |
| F | 3. | Tan Leong Chuan NGK Spark Plug Distributor | (PW3) |
| | 4. | Siti Salwa bt Ibrahim sales clerk of the plaintiff | (PW4) |
| | 5. | Tazlinda bt Tajuddin receptionist of the plaintiff | (PW5) |
| | 6. | Ho Kim Yen store manager of the plaintiff | (PW6) |
| | 7. | Tuan Haji Abd Razak bin Harun | (PW7) |
| G | 8. | Soo Siew Keen assistant business manager (development) | (PW8) |
| | 9. | Tu Siam Fee founding director of the eighth defendant | (PW9) |
| H | 10. | Kok Choo Swee | (PW10) |

[23] The first, fifth, seventh, sixth, third and fourth (DW1–DW6 respectively) took the stand to defend their case against the plaintiff.

I [24] It is pertinent at this juncture for me to begin by stating my assessment and evaluation of the evidence of the plaintiff's main witnesses first and will deal with the rest of the witnesses' evidence when discussing the issues connected to them. The plaintiff had relied heavily on the evidence of one Mr Yeow Ewe Chuan ('PW1') to prove its claim against all the defendants. PW1

who was the plaintiff's key witness was and is still the plaintiff's chief executive officer. PW1 joined the plaintiff in 1995 after the first to the seventh defendants had resigned and or retired from the plaintiff. From PW1's testimony it is obvious that PW1 had no personal knowledge of the affairs of the plaintiff. PW1 too did not have any idea of how the plaintiff was run during the management of the first and second defendant. PW1 too did not know how the employees of the plaintiff were trained and also their *modus operandi* in the plaintiff. PW1 too did not know who were authorised by the management to have access to the plaintiff's customers' list and all particulars pertaining to business dealings. PW1 too admitted both the first and the second defendants were recognised by the plaintiff as valuable employees.

A

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[25] PW1 had stated in evidence that he had uncovered the many wrong doings of the first to the seventh defendants through his own investigations after he had taken office in the plaintiff around November 1995. At his point in time all the first to the seventh defendants had already left the plaintiff. It was also in evidence that after the first to seventh defendants left the plaintiff, for a certain period the plaintiff was run and or managed by different team of management headed by one David Ling who was not called as a witness in this proceeding.

D

E

[26] PW1 informed the court that he had conducted an investigation pertaining to the first to the seventh defendants' wrong doings with the assistance of one Derrick Ong, Ho Kim Yen ('PW6') and one Mr Yip. It was also in evidence that PW1's investigation were mainly based on the interviews of three persons namely Mr Ho Kim Yen, Derrick Ong and one Miss Wong from the accounts section. Out of these three persons only Mr Ho Kim Yen (PW6) took the stand. The remaining two employees of the plaintiff who were involved in the interviews were not called to corroborate the testimony of PW1 even though these persons were available.

F

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[27] PW1 had stated in evidence that he had prepared a report on his investigations and presented the same to the Board of Directors of the plaintiff. However when challenged to produce the said report for the purpose of the trial no attempts were made by the plaintiff to produce the same in court.

H

[28] The plaintiff had called One Mr Ho Kim Yen (PW6) to corroborate the evidence of PW1 on PW1's alleged discovery of the many wrong doings committed by the first to the seventh defendants before these defendants resigned and or retired from the plaintiff. PW6 has been with the plaintiff since 1984 and is currently working as a store manager of the plaintiff. After the first defendant left the plaintiff PW6 was promoted as the sales manager. PW6 informed the court that he had made a statutory declaration ('SD') on 31 May 2001 (pp 752–753 of bundle 'B2') and stated that some time after the first

I

A defendant had left the plaintiff and on the instruction of one David Ling who was in charge of the new management of the plaintiff, PW6 had inspected the filing cabinet which contained files for overseas' suppliers and found about 20 to 30 files missing from the filing cabinet. PW6 reported his discovery about the missing files to one Mr Ling. During the cross-examination of PW6 by
B learned counsel for the first, second, fifth, sixth and seventh defendants PW6 could not tell for sure whether it was the first defendant who took the these files. PW6 too confirmed that he did not know what were in the filing room. It is obvious PW6 did not have direct evidence to support his allegations in the SD.

C
[29] Neither PW1 nor one David Ling lodged a report pertaining to the alleged missing files.

D [30] In my assessment of PW1's evidence I have considered the provision of s 60 of the Evidence Act 1950 and decided cases on the law with regards to hearsay evidence discussed below.

E [31] In *Teper v R* [1952] AC 480 at p 480 Lord Norman said:

F The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.

G [32] In *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124; [1986] CLJ 185 (Rep); ; [1986] 2 CLJ 285 the Federal Court had held that:

H In our view the material part of the evidence of DW1 was clearly hearsay evidence. His evidence was derived from interviews and not from his own knowledge. The learned judge was perfectly right to hold that such evidence was hearsay. Objection should have taken to the evidence of DW1. Hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier. The authorities are clear on this, it is only necessary to cite *Sarkar, Laws of Evidence*, (13th Ed), p 51 which reads:

I 'An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the Court to exclude all irrelevant and inadmissible evidence even if no objection is taken to its admissibility by the parties ...'

FINDINGS OF THE COURT

Alleged breach of confidentiality and or trade secret

The law

[33] For the defendants to be liable to the plaintiff for breach of confidentiality the following ingredients must be established:

- (a) the information sought to be protected is confidential in nature;
- (b) such information had been communicated in circumstances importing an obligation of confidence; and
- (c) such information was used in an unauthorised way and to the plaintiff's detriment.

(*Coco v AN Clark (Engineers) Ltd (No 2)* [1969] RPC 41 pp 5–6)

[34] In order to determine whether the information was a trade secret the following factors would have to be considered:

- (a) the nature of employment;
- (b) the nature of information received;
- (c) whether the employer had stressed the confidentiality of the information to the plaintiff; and
- (d) whether such information could be isolated from other non-confidential information within the same package of information.

(*Medic AC International Management Pte Ltd v John Walter Moore* [1988] 1 MLJ 5)

[35] The particulars of the alleged confidential information and trade secrets are as stated in para 16(e)(i)–(vii) above. From the evidence adduced during the trial the plaintiff had failed to meet the requirements that I have illustrated above as:

- (a) it is in evidence that the list of the customers in the automotive spare parts industry is freely available in the market as such the information is not confidential as claimed but is also in the public domain,
- (b) the first, second, third and fourth defendants were senior employees of the plaintiff with extensive experience in the automotive industry, having served the plaintiff for a considerable number of years and for most part of their career in the automotive industry. In view of their length of experience in the industry dealing solely with the distribution and sale of

- A automotive spare parts these defendants would have undoubtedly acquired the information and knowledge about the customers through their years of dealings with these customers as part and parcel of their scope of duties in the plaintiff. In short the first, second, third and fourth
- B defendants could not help acquiring the knowledge of some of the matters in the course of their employment with the plaintiff. So long as the defendant did not obtain the information and or acquire the knowledge surreptitiously it could not be said that it constitute a trade secret. Knowledge on the part of the defendants of the information do
- C not constitute trade secrets which are considered proprietary rights which warrants protection by this court (*VSL Prestressing Australia Pty Ltd v DJ Mulholland* [1971] 2 MLJ 89);
- (c) such information was not acquired through illegal and or unauthorised manner and or was outside their normal scope of their duties with the
- D plaintiff;
- (d) what constitutes confidential information and trade secret varies from industry to industry. One cannot equate an industry dealing with design and or trade formulae and or manufacturing and or processing of certain
- E products where some secret chemical formulae and or certain secret design which involved trade setting and intellectual property to an industry which merely deals with the sales of ready automotive parts and spare parts like the plaintiff's business;
- F (e) it was disclosed during the trial all sales representatives have access to the customers' lists and the information pertaining to the customers (*admitted by PW6 during cross-examination by learned counsel for the first, second, fifth, sixth, seventh, tenth to 13th defendants*). PW6 admitted the list of the plaintiff's customers and particulars pertaining to customers' requirement were distributed to the plaintiff's sales representatives.
- G Further these particulars were readily available to the public through Membership Directory for Engineering and Motor Parts Traders Association (EMPTA) (see cross-examination of PW1 dated 16 February 2011 Q&A 58–59) which provided contact details of its members in every states in Malaysia;
- H
- (f) PW1 had admitted in evidence (p 34 and 36 of notes of evidence dated 17 February 2011) that the plaintiff did not incorporate a clause in the individual defendants' contract of employment to restrict these
- I defendants' from doing business with the customers of the plaintiff. The plaintiff had also not shown that one of the crucial terms for the employment of the first to the seventh defendants was a term pertaining to confidentiality of information and or trade secret (see third defendant and fourth defendant letters of offer at p 28–29 and p 12–13 of the same document);

- (g) both DW5 and DW6 testified that the plaintiff's customers list as at 31 January 1996 could be accessed by all employees in the accounts department, the executive officers and the invoicing staff. The particulars of the Membership Directory for Engineering and Motor Parts Traders Association too could be accessed by the public (see Q&A 23–24 of WS-DW5; Q&A 23–28 of WS-DW6). It is also in evidence that the identity of the main suppliers and manufacturers were known to the public; A B
- (h) the evidence before me clearly showed that none of the information and or training the first to the seventh defendants received during their stint with the plaintiff was confidential or trade secrets as claimed by the plaintiff. Neither were the first to the seventh defendants notified of the confidentiality nature of the information and or trade secrets that they received whilst in the employment of the plaintiff. None of these employees were told that the information they received during their employment could not be used once they resigned and or retired from the plaintiff. Neither were these defendants told that they could not compete with the plaintiff in the event they resigned or retired from the plaintiff. Unless there was an express provisions in the contract for employment that certain information or training received during their employment with the plaintiff was confidential then the defendants could be liable for breach of confidentiality in the event such information and or trade secrets were used to the detriment of the plaintiff (see *Worlwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297; *Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling* [2008] 7 MLJ 903); C D E F
- (i) both PW1 and PW6 admitted in evidence that in dealing with the business such as this one will become familiar with the customers and their specific requirements and would not require the list. In any event the plaintiff had failed to give the particulars and or show the 'specific needs and requirements of the customers' which could be termed as 'confidential information' and or 'trade secret' in the instant case. G
- (j) at para 26 of the SOC the plaintiff had alleged that the eighth defendant had utilised the confidential information and or the trade secret obtained by the first to the seventh defendant and with the said information it was able to approach and persuade Meress Yap Swee Leong Sdn Bhd, Leng Fong Trading Sdn Bhd and Terus Jaya Auto (M) Sdn Bhd who were customers of the plaintiff to place their new orders from the eighth defendant. Despite such facts having been pleaded against the defendants the plaintiff had not called any of these witnesses to testify in court to prove its claim against the defendants. These are material witnesses who would be able to support the plaintiff's claim under this head. The failure on the part of the plaintiff to call these witnesses would definitely attract the presumption of adverse inference pursuant to s 114(g) of the H I

- A Evidence Act 1950 against the plaintiff (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, at p 494 SC; *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229 at p 235; [2006] 4 CLJ 50 at p 58);
- B (k) the plaintiff could not contend that the first to the seventh defendants were not entitled to join another company and compete with the plaintiff as the evidence had shown that it was not part of the term of the first to seventh defendants' employment that they could not compete with the plaintiff should they decide to resign and or retire from the plaintiff. Any clause which restrict the defendants to join another company with similar trade tantamount to restraint of trade and is void pursuant to s 29 of the
- C Contracts Act 1950; and
- D (l) the plaintiff had not adduced evidence that the first to the seventh defendant had stolen and or taken the information mentioned in para 16(e)(i)–(vii) above. Neither PW1 nor PW6 could positively identify the person or persons who had stolen or taken this information from the plaintiff's possession. Further if it was true as alleged by the plaintiff that the defendants had committed these serious acts with the aim to sabotage the plaintiff's business the most reasonable action for any person to do is to lodge a police report, which was not done in this case. It is obvious that
- E the claim against the plaintiff were based on suspicion, a bare assertion and unsupported by hard evidence.
- F (cases of *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297 and *Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling* [2008] 7 MLJ 903 are distinguishable as in these cases there were express terms provided in the employment contract that information received and or obtained during the employee's employment were confidential).
- G [36] From my assessment of the evidence both testimonial and documentary I am satisfied that the plaintiff had failed to prove their pleaded case of breach of confidentiality or trade secret against the defendants. The plaintiff's entire case is founded on speculations and conjunctures.

Alleged breach of good faith and fidelity

- H [37] An employer is justified in insisting that all its employees remain loyal and shall at all times act in the best interest of the employer. In the case of the plaintiff the duty of good faith and fidelity would require the first to the seventh defendants not to abuse and or use confidential information which they have
- I acquired during their employment with the plaintiff for their own benefit and to the detriment of the plaintiff. As I have discussed above under Claim 1 the plaintiff had failed to prove that the defendants had utilised confidential information or trade secrets belonging to the plaintiff for their personal gains and or advantage. Notwithstanding what I have stated above I will now

proceed to examine the plaintiff's allegation of incidences which supported its claim of breach of good faith and fidelity against the first to the seventh defendants.

A

[38] According to the plaintiff the various actions of the first to the seventh defendants among others were that the first to the seventh defendants had approached and coaxed the plaintiff's employees to leave the plaintiff and work for the eighth defendant, the first to the seventh defendants had approached the plaintiff's suppliers and persuaded them to cease their businesses with the plaintiff and to deal with the eighth defendant instead and or that these defendants had approached and persuaded the plaintiff's suppliers to reduce the supply of their products to the plaintiff, that these defendants had spread words that the plaintiff was no longer active in the business of automotive parts but had instead diverted its business to the gaming industry.

B

C

Pinching of the plaintiff's suppliers NGK Spark Plugs (M) Sdn Bhd

D

[39] Despite the plaintiff's assertion that the defendants had orchestrated the economic sabotage on the plaintiff by setting up the eighth and the ninth defendants to compete with the plaintiff the plaintiff's own witness ('PW2') had testified that NGK Spark Plug (M), a company dealing with spark plugs had the prerogative to appoint whichever company it had faith in to market its products. PW2 had also confirmed that the plaintiff was never appointed as the exclusive distributor of NGK Spark Plugs (M) Bhd. The plaintiff could not produce documents to show that it had been vested with the exclusive right to be the distributor of NGK Spark Plugs.

E

F

[40] Both PW2 and PW3 who were the plaintiff's witnesses testified that none of the first to the seventh defendants had approached NGK to ask NGK to grant NGK distributorship rights to the eighth defendant whilst they were in the plaintiff. Neither had any of these defendants approached NGK to limit its supply of goods to the plaintiff.

G

[41] It was also in evidence that the distributorship of the NGK spark plugs for the eighth defendant was not secured by the first and the second defendants. Instead it was secured by the third defendant and first defendant merely became a witness to the signatory of the agreement (see Q&A 98, 102, 106, 109–110 of PW2 dated 18 February 2011; Q&A 171–172 of PW3 dated 18 February 2011; Q&A 191–195, 200 of PW1 dated 17 and 18th February 2011; Q&A 135–141, 158–161 of PW9 dated 14 March 2011; please also see Q&A 1 of WS-DW5, Q&A 2 of WS-DW6).

H

I

[42] According to PW2 it was the top management of NGK Spark Plugs in Japan who had the ultimate authority and power to appoint any distributor of its products in Malaysia.

A [43] The fact remained that NGK Spark Plugs (M) had never granted the plaintiff any exclusive rights of distributorship. The plaintiff's assertions of breach of good faith and fidelity pertaining to its NGK Spark Plugs were merely bare allegations unsupported by reliable and credible evidence.

B [44] This court have no choice but to accept the evidence of the NGK Spark Plugs representatives (PW2 and PW3) as these witnesses were neutral and independent witnesses.

C [45] On the whole I am satisfied that plaintiff's claim that the first to the seventh defendants were approached and persuaded by the plaintiff to cease their business and or reduce their supply to the plaintiff was without merits and ought to be rejected by this court.

Allegations of 'poaching' the plaintiff's employees

D [46] The plaintiff had also alleged that the first to the seventh defendants had approached its employees and persuaded these employees to leave the plaintiff and work for the eighth defendant. None of the plaintiff's employees testified (PW4, PW5, PW6 and PW8) that the first to the seventh defendants had approached them to coaxed them to leave the plaintiff and work for the eighth defendant.

E [47] PW4 testified that the third defendant had not made any offer to her for her to leave the plaintiff and worked for the eighth defendant. PW4 did say that the third defendant had telephoned her and told her if she was not satisfied with the environment in the plaintiff PW4 could call the third defendant. However PW4 could not remember when the phone call was made. During the cross-examination of PW4 by learned counsel for the first, second, fifth, sixth, seventh, tenth to 13th defendants, PW4 candidly told the court that it was PW1 who had requested her to make the SD (p 750 of vol B2) which was made after this suit was filed.

F [48] Despite what was stated in her SD (p 751 vol B2) PW5 testified that she had no proof that the first defendant had employed the employees of the plaintiff to work for the eighth defendant. PW5 had also confirmed that the SD was made at the request of PW1. Further PW5 had also confirmed that the SD was not prepared by her but by a lawyer and that she merely attested the SD. To most of the questions asked by learned counsel for the third defendant to PW5 in her cross-examination PW5 took the easiest way by saying that she could not remember anything.

I [49] PW6 had also confirmed that no one had offered him a post in the eighth defendant. The SD (p 752–753 of vol B2) was also made after this action was filed against the defendant.

[50] PW7 had also attested a SD (p 757–758 of vol B2) at the request of PW1 and that the SD was prepared by a lawyer only for him to sign. A

[51] None of the witnesses who attested the SD said that the first, second, fourth, fifth, sixth, and seventh defendants had approached or coaxed them to leave the plaintiff and work for the eighth or the ninth defendants as claimed by the plaintiff. B

[52] The plaintiff could not provide the statistics to show the number of its employees who had left the plaintiff to join the eighth defendant and or identify who are the plaintiff's employees who are currently working for the eighth defendant. C

[53] In view of the above the plaintiff's claim that the first to the seventh defendants had approached the plaintiff's employees and coaxed them to work for the eighth defendant was merely bare assertion unsupported by evidence either testimonial and or documentaries. It was obvious to this court that these SDs were prepared by the plaintiff's solicitor to be signed by PW4, PW5, PW6 and PW7 and these SDs were made at the insistence of PW1 after this action had been filed with the purpose for the same to be used in this trial. These SDs were mere afterthought and or made for the purpose of assisting the plaintiff in its case against the defendants. D E

'Poaching' of the plaintiff's supplier

[54] The plaintiff in this case had not adduced credible evidence to demonstrate to this court that the defendants had caused the plaintiff's other suppliers to terminate the plaintiff's distributorship rights and grant the eighth defendant those rights instead. The plaintiff was not able to prove that it had exclusive rights over any particular products. As I have indicated in the earlier portion of my judgment this court could not rely on the evidence of PW1 as his evidence was tainted with hearsay evidence and therefore inadmissible. F G

[55] Pertaining to the plaintiff's allegations that the defendants had approached suppliers such as PBR Automotive Pty Ltd, Baisei Corporation Sdn Bhd, Petrochem (UK), with the intention to persuade these suppliers to appoint the eighth defendant as agents for their products these allegations remained a bare assertion. No representative from any of these suppliers was called to support the allegation. The failure to call one Mr David Ng and Mr Phil Mason mentioned by PW1 in his cross-examination (see Q&A 134–142 and Q&A 26–31, 130, 172–178 dated 17 February 2011) to corroborate PW1's evidence would definitely attract the presumption of adverse inference pursuant to the provision of s 114(g) of the Evidence Act 1950. As the evidence of PW1 remained inadmissible in this court there is nothing before this court H I

A to prove the plaintiff's allegation against the defendants (Section 60 of the Evidence Act 1950; *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627).

False allegation that the plaintiff was no longer in the automotive parts business

B

[56] The plaintiff alleged that the first defendant to the seventh defendants had made false statements and spreading words that the plaintiff was no longer active in the automotive business but had instead diverted its business to gaming. According to PW1, PW6 and PW8 they were informed by their customers that the first to the seventh defendants had told them this. However the plaintiff made no attempts to call its customers who were its material witnesses to support its claim.

C

D [57] The plaintiff's own witness ('PW7') who had also attested a prepared SD at the request of the PW1 had also said during his cross-examination by learned counsel for the first, second, fifth, sixth and seventh defendants (see evidence of PW7 dated 28 February 2011 during cross-examination Q&A 34–35) that the first defendant did not tell him that the plaintiff was no longer dealing with the automotive parts business. However the first defendant had told him that he had left the plaintiff and now he was dealing with the automotive parts business. PW7 further told this court that it was common knowledge that the plaintiff was diverting its business and focussing on the gaming industry and that it was in the news. This was supported by the annual reports of Repco Holding Bhd (exh 'P18'), a parent company of the plaintiff which disclosed that the plaintiff was moving from its automotive parts business to gaming and timber industry (see cross-examination of PW1 dated 16 February 2011, Q and QA 166–169).

E

F

G [58] The plaintiff's claim that the first to the eighth defendants had caused words to be circulated to the effect that the plaintiff was no longer dealing with automotive parts business remained a bare assertion. Further it was also disclosed during trial that after the first to the seventh defendants resigned and or retired from the plaintiff, the plaintiff was under the new management headed by one Mr David Ling who would be in a better position to elaborate on the plaintiff's main focus of business at that material time. The plaintiff opted not to call this crucial witness to support the assertion.

H

Allegations of conspiracy to injure

I

[59] The allegations of conspiracy to defraud with the intention to injure were as stated in paras 31–32 of the SOC. In order to establish a conspiracy to defraud with the intention to injure, the plaintiff must establish that 'there must be an agreement or 'combination' of two or more with the common

intention to effect an unlawful purpose or to do a lawful act by unlawful means resulting in damage to the plaintiff (see *SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (Malaysia) Sdn Bhd* [2008] 4 MLJ 187; [2008] 4 CLJ 20 and *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332; [2001] 8 CLJ 262). The plaintiff must not only prove that there was an agreement but must also prove the overt acts which had been alleged to have been done by the parties to the conspiracy which had caused injury and damage to the plaintiff (see *Seah Siang Mong v Ong Ban Chai* [1998] 1 CLJ Supp 295).

[60] As the regards to allegation of fraud, the law on fraud is well settled. This had been well illustrated in the case of *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136; [1980] 1 LNS 55 which states:

Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie dishonesty of some sort' for which the registered proprietor is a party or privy. Fraud implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of whatever he is entitled ... Thus ... it was said that, if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ...

[61] The case of *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328; [1995] 1 LNS 80 states as follows:

To sum up, fraud implies some base conduct and moral turpitude and a person is taken to have acted fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person. That is what is known, as 'fraud' or fraudulently. Further we agree that fraud whether in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion or conjecture.

[62] The Supreme Court case of *Chu Choon Moi v Ngan Siew Tin* [1986] 1 MLJ 34; [1985] 1 LNS 134 at p 38 (MLJ) states as follows:

We agree that fraud whether made in civil or criminal proceeding must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court or a prudent man considers its existence probable in the circumstances of the case.

(see *Saminathan v Pappa* [1981] 1 MLJ 121; [1980] 1 LNS 174; *Narayanan v Official Assignee, Rangoon* AIR 1941 PC 93; *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328; [1995] 1 LNS 80; *Yong Tim v Hoo Kok*

- A *Chong & Anor* [2005] 3 CLJ 229; *Chong Song @ Chong Sum & Anor v Uma Devi a/p V Kandiah* [2011] 2 MLJ 585).

B [63] From the evidence adduced before me during the trial the plaintiff had failed miserably to meet with the standard of proof to establish any allegation of conspiracy to defraud beyond reasonable doubt.

C [64] For the sake of completeness I would like to stress here that the plaintiff had failed to properly plead the particulars to support its case of conspiracy to injure especially pertaining to matters relating Ernst mufflers, Catalytic converters and sales of Repco Autoparts which evidence were attempted to be introduced by the plaintiff to prove the conspiracy theory against the defendants. This line of questioning was objected to as the same had not been pleaded by the plaintiff in its pleadings. It is settled law that the assertion of conspiracy requires the strictest pleading and must be supported by full particulars. It is also settled law that parties are bound by their pleadings and shall not adduce any evidence for issues which had not been pleaded. It is trite that unless particulars of conspiracy are specifically pleaded, no evidence can be led on them (*YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621).

E [65] In order to prove the tort of conspiracy, the plaintiff had to show the conspiratorial agreement followed by overt acts of causing damage (see *Marrinan v Vibart* [1962] 1 All ER 869 at p 869). A charge of conspiracy is a serious one. Therefore the plaintiff must plead the facts of this tort sufficiently in its pleadings by giving full particulars of the assertion pertaining to the conspiracy theory.

Sale of Repco Autoparts

G [66] The plaintiff's allegation that the first and second defendant had engineered the sale of Repco Autoparts in order to secure their position before joining the eighth defendant was not consistent with its evidence in court. PW1 had in fact told this court that Repco Autoparts was sold because 'it was making heavy losses in 1994'. That was the reason why Koperasi Pekerja Kerajaan Sabah' the shareholders of Repco Autoparts decided to dispose Repco Autoparts at that material time. The plaintiff however switched its story by alleging that the first and the second defendants had engineered the sale of Repco Autoparts to secure their position before joining the eighth defendant.

I [67] It was in evidence through the plaintiff's own witnesses ('PW9') and ('PW10') that it was one Mr Yip who had approached PW10 to propose the sale of Repco Autoparts to the eighth defendant (see Q&A 293 and 301 of PW10 dated 15 March 2011). PW10 told this court that neither the first nor

the second defendants were involved with the negotiations to purchase Repco Autoparts and or helped finance its purchase. The plaintiff did not prove that there were overt acts on the part of the first and the second defendants which had resulted in the loss suffered by the plaintiff, an essential ingredient in the tort of conspiracy which needed to be proved by the plaintiff.

A

B

Setting up of the eighth defendant

[68] It was the contention of the plaintiff that PW9 and PW10 had set up the eighth defendant for the first to the fourth defendants and that the PW9 and PW10 were nominees of the first to the fourth defendants. Despite being repeatedly cross-examined by learned counsel for the first, second, fifth, sixth and seventh defendants PW9 still maintained that he was the person who invested in the eighth defendant. PW9 further stated that notwithstanding the fact that he had little knowledge in the business he was confident to invest as he had PW10 to assist him with the business. Both PW9 and PW10 confirmed that they were running the eighth defendant from its inception until prior to 1995. PW9 had also testified that even though he did not have the experience in the industry one Patrick Tan Teong Ghee who had the experience in autoparts business had helped PW9 and PW10 to run the eighth defendant.

C

D

E

[69] Based on the evidence of PW9 and PW10 who were the plaintiff's witnesses this court is satisfied that the eighth defendant was in fact set up by PW9 with the help of PW10 for themselves and not for the benefit of the first second, fifth, sixth and seventh defendants as claimed by the plaintiff.

F

[70] On the whole I am satisfied that the plaintiff had failed to adduce evidence to support its case of conspiracy against the defendants on the standard required by the law, which is, beyond reasonable doubt.

G

Assertions of economic sabotage

[71] It was the plaintiff's claim that the first to the seventh defendants had orchestrated economic sabotage against the plaintiff whilst these defendants were still in the employment of the plaintiff. The defendants were alleged to make payment of commission upon sales and not upon collection, sales of goods at price below cost and or at cost and or at a low profit, orders placed with Repco allegedly supplied by the eighth defendant, purchase of brake fluids from the eighth defendant and purchases of Ernst Mufflers and Catalytic converters.

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Payment of commissions upon sales and not upon collection

[72] The plaintiff had alleged that first defendant had purposely paid

- A commission upon sales and not upon collection with the sole aim to injure the plaintiff and this was done in preparation for the first defendant to resign the plaintiff and to set up a competing company in the form of the eighth defendant.
- B [73] However the plaintiff had not proved by way of documentary evidence the pattern for the payment of commission upon sales and not upon collection as claimed by them. The plaintiff merely produced records for the commission paid in April 1995 to June 1995 to support its contention of payment of
- C commission upon sales and not upon collection. Despite being challenged by learned counsel for the first, second, fifth, sixth, seventh, tenth to 13th defendants the plaintiff did nothing to prove its allegation (see cross-examination of PW1 dated 17 February 2011 Q&A 117).
- D [74] All the defendants who testified confirmed that that was the practise adopted by the plaintiff for the last 20 years and prior to the first defendant's resignation and or the second defendant's retirement from the plaintiff to pay commission upon sales and not upon collection. The first to the seventh
- E defendants remained consistent despite being severely cross-examined by learned counsel for the plaintiff.
- F [75] It was also in evidence that even after the first defendant resigned from the plaintiff, the plaintiff through one Thomas Cornwell, a senior purchasing executive had adopted similar practise (see Q&A 59–83, 88–106 of PW1's testimony dated 17 February 2011 during cross-examination of PW1). The plaintiff however opted not to include Thomas Cornwell in this suit but decided to pursue its claim only against the defendants.
- G *Orders placed with the plaintiff allegedly supplied by the eighth defendant*
- H [76] The plaintiff had failed to prove this allegation against the defendants. The plaintiff attempted to adduce hearsay evidence as such this claim was not supported by credible evidence in this court.
- I *Purchase of break fluids from the eighth defendant, purchase of Ernst Mufflers, Catalytic converters*
- I [77] The plaintiff merely showed one instant where the plaintiff had purchased break fluids and Ernst Mufflers from the eighth defendant (PW1's examination-in-chief in supplementary Q&As 20–23) by way of purchase order dated 28 March 1995 and purchase order dated 13 July 1994 respectively. In respect of the rights of the distributorship of Ernst Mufflers

PW10 had testified that he was the person responsible to secure the distributorship of Ernst Mufflers for the eighth defendant and not the first to the seventh defendants.

[78] The plaintiff had not pleaded the issue of Catalytic Converters in its pleadings. Therefore I will not elaborate on this issue in this judgment for obvious reason.

CONCLUSION

[79] On the totality of evidence both testimonial and documentary I am satisfied that the plaintiff had failed to discharge the onus placed on it by the law to prove its case against all the defendants on the balance of probabilities and or beyond reasonable doubt whichever is applicable to the plaintiff's pleaded case. For the reasons stated above the plaintiff's claim is hereby dismissed with costs of RM100,000 to be paid by the plaintiff to the first, second, fifth, sixth, seventh, tenth to 13th defendants and RM100,000 to be paid by the plaintiff to the third, fourth, eighth and ninth defendants respectively.

Plaintiff's claim dismissed with costs.

Reported by Mashrifah Ravendran

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